

Meeting Date: 4-25-06

Santa Clara



AGENDA REPORT

City of Santa Clara, California

Agenda Item # 5.E



DATE: April 21, 2006

TO: Mayor and Council for Information

FROM: City Manager

SUBJECT: Background Information and Responses to Council Questions at April 11, 2006 meeting Regarding Proposal from Police Officers' Association (POA) and Firefighters' Union for Binding arbitration Ballot Measure for November 2006 Election

On April 11, 2006, the City Council held a Study Session to discuss the proposal from the public safety unions to place a ballot measure on binding arbitration on the November 2006 ballot. The City Council approved a motion that staff work with the petitioners regarding answering the questions raised in the study session, that the meeting be shown twice per day and seek public input on the City cable channel, that staff identify locations for and begin to implement a series of public forums, and to schedule April 25 as an additional study session and May 9th as the date for considering the issue of placing the item on the ballot.

Attached are responses to many of the questions. Due to the short timeframe to prepare written responses to all the questions, some additional responses will be distributed at the April 25, 2006 City Council Study Session. The Fire Chief and Police Chief forwarded questions that were specifically directed by Council to the POA and Firefighters' Union representatives.

In a separate memorandum, Deputy City Manager reports on the community forums, and Channel 15 airing of the April 11, 2006 Council meeting.

In addition, the City Clerk's Office received the "Proof of Publication" in the San Jose Mercury News of the "Notice of Intent to Circulate Petitions," the signature gathering process is underway.

In addition to responses to the questions, two attachments are included in this report:

1. Binding Interest Arbitration Proposal: Potential Conflicts (prepared by the City Attorney's Office); and
2. Binding Interest Arbitration - Northern California Agencies (prepared by the Human Resources Department).

A handwritten signature in cursive script that reads "Jennifer Sparacino".
Jennifer Sparacino
City Manager

Documents Related to this Report:

Responses To Questions From The April 11, 2006 Study Session Regarding Binding Arbitration
Binding Interest Arbitration Proposal: Potential Conflicts
Binding Interest Arbitration-Northern California Agencies

**RESPONSES TO QUESTIONS FROM THE APRIL 11, 2006 STUDY SESSION
REGARDING BINDING ARBITRATION**

1. **Several questions related to definitions of binding arbitration, advisory arbitration, mandatory mediation, and issue-by-issue arbitration. The City Attorney's Office has provided the following definitions.**

Arbitration: A method of resolving disputes between an employer and employee organization in which a third-party, or arbitrator, hears evidence and issues a decision.

Binding Arbitration: The arbitrator issues an opinion that is final and binding on the parties.

Advisory Arbitration: The arbitrator issues an advisory opinion that the parties may choose to accept or not.

Mediation: A method of resolving disputes in which a neutral third-party, or mediator, assists the parties in reaching agreement. The mediator does not decide the dispute, but acts as a go-between to assist the parties in finding areas of agreement.

Voluntary Mediation: The parties choose whether or not to go to mediation.

Involuntary Mediation: The parties, by prior agreement or order of a court or arbitrator, must engage in mediation.

Last Best and Final: "LBF." Refers to the last package offer submitted by each side at the negotiating table. Some binding arbitration procedures have to take one LBF or the other – individual issues cannot be settled separately.

Issue-By-Issue: Used in either arbitration or mediation. Means that a list of issues are submitted, and settlement may be reached, or a decision may be issued, on individual issues.

Interest Arbitration: A process in which an arbitrator issues a decision resolving disputes which remain after negotiations have taken place but no agreement has been reached; establishes the terms of the agreement.

Grievance Arbitration: A process in which the arbitrator interprets and applies an existing agreement to a particular dispute.

2. **If public safety unions obtain sufficient signatures to place binding arbitration on the November 2006 ballot, what would be the costs to the City?**
A successful initiative process would cost approximately \$65,322 -- \$82,422.

3. **If public safety unions obtain sufficient signatures to place binding arbitration on the November 2006 ballot, who would pay?**

The City would be responsible to pay for the election. The City may accept an offer by the proponents to pay for the costs of the election, but would not be able to compel this payment. See separate City Clerk's report for details.

4. **How does the funding of the initiative work?**

The funding for the initiative process includes the basic elements of signature verification, election costs, and publication and translation services. Again, see City Clerk's separate memorandum for a more thorough report.

5. **The City Clerk mentions that August 11th is the date we need to get the ballot measure to the County.**

August 11th, 2006 is the final date that the Registrar of Voters will accept an election being called by a City or jurisdiction within Santa Clara County. Due to the many requirements related to the initiative timeline, it is unlikely that the August 11th deadline would be reached through City Council deliberations regarding placing the item on the ballot. However, this deadline may have an impact on the publicly driven initiative process. See the City Clerk's Agenda Report for more information.

6. **What is the source of information for the City Manager's staff report submitted for the April 11, 2006?**

Several source of information were used as the basis for the City Manager's staff report on binding arbitration:

First the City Attorney's Office prepared a detailed analysis of the proposed Charter amendment which included specific clauses in the amendment, potential conflicts with the City Charter and other City policy documents including City Code, Civil Service Rules and Regulations, City Manager Directives (CMD's), Fire Chief Directives (FCD's) and Police Chief Directives (PCD's). The City Attorney's Office matrix also included comments on legal effect, including City Charter and state law.

Second, the HR Department surveyed 13 cities in Northern California agencies who have binding arbitration. The survey covered (1) Elements included in each cities arbitration language; (2) history; and (3) costs.

Third, information about the results of the 2003 police and fire negotiations were prepared by the Human Resources Department and included a summary of the Memorandum of Understanding (MOU) approved by the City Council and bargaining groups.

Fourth, extensive research was conducted through review of available materials on the topic from other cities and League of California Cities.

7. **Does state law prevent police and firefighters from going on strike?**

Since 1959, strikes by firefighters are prohibited by California Labor Code section 1962. Strikes by police officers are "per se" illegal under California case law, since 1989.

8. **Do any other employees or groups also have this restriction where they are prevented from striking as a result of disagreement?**

Non-safety employees have a limited right to strike under California law. However, if the strike impacts the delivery of essential services and creates a substantial likelihood that serious harm will be experienced unless immediate action is taken and an emergency will be created, (e.g., a strike by sanitation workers), the local agency may seek a court order to stop the strike.

9. **Who wrote the language of this proposed Charter amendment for binding arbitration?**

At the Council meeting of April 11, 2006, Mr. Alan Davis, attorney for the Public Safety Unions indicated that he wrote the language for the proposed ballot measure for binding arbitration for Police Officers' Association (POA) and Firefighters' Union (FF).

10. **In the ballot language being proposed (focus on the language) is there any inconsistency with the City Charter, especially in relation to Charter provisions regarding the elected Chief of Police?**

The proposed measure either contains language that directly or indirectly conflicts with the following City documents, or which, by potentially allowing submission of a broad range of issues to binding arbitration, may impact or even override the following:

- City Charter: City Council authority over fiscal matters; City Manager authority over administrative matters, especially hiring and disciplinary matters; Fire and Police Chief authority over operational issues
- Civil Service Rules: examinations, grievance review process, appointments, transfers
- Memoranda of Understanding (MOUs): reservation of management rights clauses
- Employer-Employee Relations Ordinance: impasse procedures; bargaining unit determination procedures
- City Manager Directives: many directives, including but not limited to grievance procedures, meal policies, sick leave usage, training, off-duty employment, flexible work schedules, conference and meeting attendance, recovery of court expenses, examinations, workplace security.

Please see attached chart for further information.

The Police Chief mentioned that binding arbitration may take away his ability to achieve some of his charge of public safety. Could the Police Chief elaborate on that impact? This comment relates to my role as the elected Police Chief and will be described below.

Would the language that is proposed create any inconsistencies with our charter?
Especially when it comes to our charter provisions around our elected chief of police.

The City Charter reads, "The Chief of Police shall have power and be required to:

- (a) Preserve the public peace;
- (b) Execute and return all process issued to him by legal authority; and
- (c) Exercise all the powers that are now or may hereafter be conferred upon sheriff's and other police officers by the laws of the State." (Section 906)

From this Charter language comes the City Code Section (2.46.010) which states, "The police department shall be under the direct supervision of the chief of police who shall be elected by the voters for a term of four years.

I believe the binding arbitration proposal does impact the Charter of our City. My power and requirement to preserve the public peace will now be shared with an arbitrator panel on matters taken to binding arbitration. Further, my ability to "directly supervise" as a mandate from the citizen's as an elected chief is similarly impacted for the same reason. My understanding of the rationale for having an elected Police Chief is to provide the citizen the ability to determine who will be making those management decisions. Binding arbitration will prevent that for all matters taken to arbitration.

11. **On the language that is being proposed, what is the impact that it may have on our civil service process, what has been other cities' experience with their civil service process?**

Because the language of the measure is somewhat vague, the measure may enable many issues related to the civil service process, including hiring and promotional qualifications, disciplinary decisions, and pay points to be submitted at the bargaining table, and if agreement is not reached the matter may go to binding arbitration. An arbitrator would then rule on the issue, thereby either overriding our current Civil Service Rules, CMDs, and Charter provisions or creating serious conflicts with such documents.

12. **Does this include grievances? Do all other cities include grievances in their binding arbitration ordinances?**

The measure provides that "all matters relating to the wages, hours, and other terms and conditions of City employment, including the establishment of procedures for the resolution of disputes concerning the interpretation or application of any negotiated agreement "shall be subject to negotiation, and that "all disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations . . ."are subject to arbitration.

Because this language is vague and somewhat broad, issues that are now submitted to the grievance process (which has been in place for more than 30 years), including disciplinary decisions, may now be submitted to arbitration instead of to the Civil Service Commission. Although the City would argue against any overly-broad construction of the language, an arbitrator may determine that the issue falls within his or her jurisdiction, and proceed to bind the City to a particular disciplinary action, or other grievable matter.

Other cities have similar language in their charter relating to binding arbitration. Thus, matters submitted to grievance processes may arguably be subject to binding arbitration in those agencies as well.

13. In cities where binding arbitration is in effect, who typically is appointed to the board that represents the City?

Binding interest arbitration is usually conducted before a single arbitrator, who is selected from a panel of professional arbitrators. The proposed measure in Santa Clara consists of a three-person arbitration board, with each side choosing their own appointees, who in turn select the third arbitrator.

As proposed in the measure, there are no restrictions on who may be appointed as an arbitrator by each side. Considerations for appointees to a multi-person panel include:

- (a) any particular expertise in financial, operational, managerial or other relevant issues;
- (b) the ability to invest the time spent in arbitration, and in negotiating and drafting an arbitration decision with the other arbitrators;

Typically each side would appoint someone who is reflective of their particular viewpoint. For local agencies, the Human Resources Director, Assistant City Manager or Assistant City Attorney usually has the expertise to serve as an arbitrator. Other agencies may choose to have services of a professional arbitrator, although such an individual may not fully support the City's viewpoints on the issues submitted to arbitration.

14. Council a "Sunset Clause," as almost a test case, be included in the Charter amendment?

A "sunset" clause is a provision in a particular piece of legislation that terminates all or part of the legislation after a certain date. Sunset clauses are normally used in situations where funding is limited to a certain time period, or the project at issue will only take a certain amount of time to complete. Having a sunset clause in a particular piece of legislation does not prevent future legislation from making the law permanent, or even extending the sunset clause to allow for continued operation

The City Attorney's Office is not aware of a sunset clause being used in the context of binding arbitration.

15. Can City resources be used to support or oppose a ballot measure?

Cities may not use public resources to support or oppose a ballot measure. Cities may use public resources to inform and educate the public so long as such efforts are not designed to influence voters and are a fair presentation of relevant information. For example, an article in a newsletter explaining a local ballot measure with a statement to contact the proponent of a measure for more information is a valid expenditure.

In regards to individual employees, California Elections Code section 3201 and following, as well as City Council Resolution 5739 and City Manager Directive 82, place restrictions on the ability of staff to engage in political activities. For on-duty conduct, some of these restrictions that no political activities may occur:

1. on work time, e.g., gathering petition signatures;
2. on City premises, e.g., handing out leaflets at City Hall or recreational centers;
3. that use City resources, e.g., use of the copier or mail system.

For off-duty conduct, some of these restrictions are that:

1. no political activities, e.g., precinct walking, may be conducted while in uniform;
2. employees may not identify themselves by using their city title or position, e.g., while making speeches about a ballot measure;
3. employees may not use their "indicia of office" such as a badge or letterhead.

Employees may engage in political activities off-duty, such as joining citizen groups supporting or opposing a ballot measure. Employees may always provide relevant, factual information regarding ballot measures, whether on or off-duty. Moreover, because the Police Chief is an elected position, in his capacity as an elected official he is not subject to restrictions from such activities.

16. Police Chief: Will binding arbitration impact safety, and if so, how?

I believe the answer is yes. This binding arbitration proposal includes "working conditions." Depending on how an arbitrator decided on an issue, it could impact safety. On the other hand if working conditions were not a part of the proposal, or a working condition was never taken to arbitration, the answer would obviously be no.

An example that we all hope would never occur in Santa Clara recently occurred in the City of Oakland. Oakland Police have binding arbitration. In the first quarter of 2006 their homicide rate had tripled. It was determined that most of the homicides occurred late in the week and during the evening hours. The Chief of Police ordered that a number of dayshift officers be transferred to the night shift to assist in trying to reduce the incidence of homicide. The union stepped in and said the Chief did not have the power to do this and that he had to first meet and confer with the union, and if they were not able to come to agreement, the issue would be subject to arbitration. In response the Chief was forced to

ask the City Council to declare a state of emergency for the city as a result of the homicide rate which would provide an exception to the process.

Under the current system, I have the ability to "take all necessary actions to carry out it's mission in emergencies." (Current Unit 2 MOU – Management Rights) Now, do I envision a time where our officers might fail to respond to such a crisis? No, but it is a valid example of what binding arbitration does to a managers ability to manage.

A seemingly more mundane issue is staffing. Today, I decide what is an appropriate number of officers on duty at any given time based on the calls for service, response times, safety of the public and safety of the officers. If an arbitrator decided that I had to put two officers in every patrol car for safety reasons, I would have two choices. Cut the number of patrol cars per shift that are distributed across the city (which would affect our response times to calls) or double the number of officers I have in the department from 147 to 294 (an expensive proposition).

The police department administrator in Oakland I spoke to described the binding arbitration process as "painful" to the extent that they will be asking the voters to rescind binding arbitration in an upcoming election. The majority of the cases taken to arbitration related to discipline or grievances. The administrator said the arbitrator usually tries to give each side something. The problem in Oakland was, in the case of a termination for a serious case of misconduct, the arbitrators ruling was to vacate the termination and give the officer a suspension. The problem with that is that the City now has a police officer back working in the community that it believes is unfit or dangerous.

17. Can more details be provided about the follow-up to the 2003/04 Employee Negotiations?

After the 2003-2004 negotiation cycle, the City Manager and other management staff members met individually with representatives of the employee organizations to discuss the process and ways to improve it in the future. Many ideas were discussed with the various groups, and agreed to for future negotiations. These included:

- Share financial data prior to the start of actual negotiations.
- Actual written contract language to be exchanged during the process.
- Tentative agreements reached to be signed off as they occur.
- Develop negotiating teams reflective of the City's philosophy and approach negotiations as a partnership.
- Set meeting schedules in advance of the negotiations with the understanding that some changes may need to be made during the process.

- Good communication and mutual respect are the key elements, at all times, not just during labor contract negotiations.
- Develop clear ground rules.
- When serious problems arise during the process that cannot be resolved by the Negotiating Teams, the Union representatives could request a meeting with the City Manager to resolve process concerns.

Results

Since the discussions following the 2003-04 Employee Negotiations, no MOU negotiations have occurred with POA and FF Unions. The next negotiations with POA begins on August 29, 2006; and the next negotiations with FF Union begins on October 1, 2007. Although formal negotiations are not yet underway, both the Chief of Police and Fire Chief meet regularly with the respective Union Presidents.

During the 2005 negotiations with the miscellaneous employee bargaining groups, all of the items agreed upon were implemented.

In these negotiations the City developed a Negotiating Team that focused on a collaborative approach, and despite economic challenges the atmosphere was much improved. Actual written contract language was exchanged across the table and tentative agreements were signed off when reached. Financial information was given and reviewed with the groups in meetings prior to the exchange of proposals. The City negotiating teams in some cases had different participants. A meeting schedule was agreed upon prior to the start of negotiating meetings.

The employee organizations also did things differently: most groups had some or all different participants in their negotiating team and the groups requested coalition bargaining. Through this process they prioritized their goals: retirement enhancement and wages. The City agreed to the Coalition Bargaining, the first time this approach was used in formal negotiations.

Prior to the start of the 2005 negotiations, efforts have been made to improve communication by meeting when necessary and reducing things in writing to clarify issues. Labor management committee meetings regularly with AFSCME and IBEW. Quarterly meetings were held to discuss the DOT (Federal Department of Transportation) Policy (which is federally mandated drug testing program), processes and any issues that may need to be addressed. DOT Policy training was conducted for all participants in the program and administrators of the program. The Electric Department managers, the Director of Human Resources and IBEW stewards and officers participated in training provided by the State Mediation Service on labor management relations.

There was mutual respect at the table throughout the process. The MOU's were compiled, signed and adopted by the Council within two weeks of the conclusion of the negotiations

and ratification by the groups. Voluntary Mediation was participated in, as part of the overall efforts to reach mutual agreement. At the conclusion of the negotiations all groups expressed appreciation for the much improved process. The City also expressed appreciation to the groups for the hard work and commitment that each participant brought to the table.

As highlighted in a previous report, the City Council developed Principles to guide their actions during the negotiations. The Principles were adopted unanimously at a City Council meeting. The Mayor, all Council Members and the City Manager signed the document, emphasizing commitment to conducting an excellent employee negotiations process.

18. In the 2003 difficult negotiations, what were the primary issues; wages, benefits or working conditions?

During the previous negotiations, there were issues relating to wages, benefits and working conditions. The Agenda Report for the April 11, 2006 Council meeting included Attachment E and Attachment F. The attachments provide a summary of the negotiation issues/ proposals and the results/outcome of each issue.

19. Was the City's Ethics Advisor asked for an opinion regarding the Union paying for cost of ballot measure?

No, the Ethics Advisor was not consulted on this question.

20. In the staff research, were there any agencies where services were cut or local control was taken away?

Cities traditionally have local control on issues relating to City municipal functions. Local control is a fundamental tenant of California state law and Santa Clara's City Charter. In agencies that have binding arbitration, local control is taken away. When an arbitrator makes a decision it is final and binding on City Council. Currently, in the City of Santa Clara the City Council has final decision-making authority to resolve negotiations. In fact, City Council has a general grant of power that is one of the basic premises of the Charter. Local control determines service levels. As an example, local control allowed the City of Santa Clara to create its own Electric Utility.

When an arbitrator makes an award, the ramifications of the award (financial, operation, etc.) must be dealt with by the City. For example, the City of Gilroy was impacted by an arbitrators' award in 1999. An arbitrator required the City to increase Firefighter staffing from 6 to 8 Firefighters per shift year-round. The increased staffing had to be implemented immediately, which required the City to incur overtime costs to provide the additional staffing while the City went through the process of hiring Firefighters. On an on-going basis the City had to fund the additional firefighters salary and benefit costs. As a result, other City department budgets had to be reprioritized, and could not increase their spending in order to deal with the increased operation costs of their departments; and costs for new programs had to be handled without new funding.

21. What is the voting history of binding arbitration where it has been a ballot measure?

Four binding arbitration elections were held, which resulted in two measures approved by the voters; two measures not approved. Staff obtained information on the following:

Sunnyvale 1998 Election: Two Binding Arbitration Measures – Both Failed

Oroville 2004 Election: Binding Arbitration Measure – Passed

Monterey 2002 Election: Binding Arbitration Measure – Passed

San Mateo 1991 Election: Two Binding Arbitration Measures – Both Failed

22. Are there legal and/or ethical concerns regarding accepting \$57,000 contribution from the Unions to place the binding arbitration measure on the ballot?

The City Attorney's Office has noted that it is not illegal to accept the \$57,000 contribution from the Unions. Although it may be legal, it may also create a perception that the Council is in support.

The City Manager's concern relates to a change in past practice and establishing a new precedent, as well as the perception concerns about the process. If another group with a special issue has petitioned the Council to place a Charter amendment on the ballot (without a qualifying signature drive) as is being requested by the public safety unions, then that group could point to the current request as a new practice; and request similar treatment, thereby eliminating the need for a petition drive with all the additional cost and effort involved in obtaining qualified signatures.

The City has a consistent process used in the past, in which Charter changes are made following the recommendations of a citizen based Charter Review Committee.

23. If the City changes the process for negotiations for public safety, would it be fair to change the process for non-public safety employees?

Employees in non-public safety bargaining groups may feel that they also should receive similar options. The President of one City bargaining group contacted City staff inquiring how they could also be considered for this request. Most cities with binding arbitration restrict it to Fire and/or Police, although City of Vallejo has binding arbitration for all employee bargaining groups. City staff would have the same serious concerns about the loss of local decision-making authority for Miscellaneous Bargaining Groups as for public safety unions if binding arbitration was enacted.

24. **Have the other bargaining units taken a position on the public safety unions' request for binding arbitration?**

The City staff have not received any information from the eight miscellaneous bargaining groups indicating that they have taken a formal position on the issue of binding arbitration for police and fire. The Human Resources Director, Police Chief and Fire Chief have all received questions from bargaining unit representatives and employees.

25. **Could a binding arbitration (financial) award impact the City's Electric Utility, Silicon Valley Power?**

City Charter § 1320 ["Utilities fund"] creates a unique fund termed the Utilities Fund. The Utilities Fund was set up to be separate from the General Fund. The source of funding is revenue receipts from the operation of the utilities (i.e., Electric, Water and Sewer). As added protection for the Utilities Fund, expenditures can be made only for expenses incurred by the City's utilities. If the arbitrator/arbitrator panel adheres to Section 1320's restrictions on what payments can be made from the Utilities Fund, Section 1320 Utilities Funds should be protected as intended by the City Charter.

26. **Has there been a circulation of petitions?**

The City Clerk's Office received the "Proof of Publication" (San Jose Mercury News) of the "Notice of Intent to Circulate Petitions." The signature gathering process is underway.

27. **Has binding arbitration been successful in Palo Alto?**

The attached matrix prepared by the Human Resources Department indicates that the City of Palo Alto has binding arbitration for fire and police. See "Binding Interest Arbitration-Northern California Agencies," page 3 of 5.

28. **Has binding arbitration caused any City to have financial problems or drained resources?**

Please see Question 20 that gave details of binding arbitration decision that caused additional General Fund costs to the City of Gilroy. Between 1974 and 1992, the City of Oakland had six arbitration decisions. Financial impacts resulted from 4 of the 6 arbitrators' decisions. A decision in 1991-92 cost the City approximately \$1.3 million over what was budgeted for fiscal year 1991-92, in a year when the City had made budget reductions citywide of over \$7 million. Procedural costs of the arbitration were approximately \$235,000.

29. **Provide research on other cities ordinances, both their language and how it compares to the proposal before the City Council.**

The Human Resources Department is conducting this research. A summary will be available on April 25, 2006.

The following questions were forwarded to the public safety unions.

31. **Would the unions plan on promoting as endorsement by Council if this is put on the ballot or are you willing to make a commitment not to promote it as such if Council would put it on the ballot?**
32. **Has there been any circulation of petitions?** (City response included above.)
33. **The unions have offered to pay for the binding arbitration initiative if the Council puts it on the ballot, what if it goes on through the initiative, does that offer for the unions to pay still apply?**